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Nos. 82-662 and 82-703

In the Supreme Court of the United States

OCTOBER TERM, 1982

MIDDLESEX COUNTY UTILITIES AUTHORITY, PETITIONER

v.

CITY OF NEW BRUNSWICK, ET AL.

BOROUGH OF MILLTOWN, PETITIONER

v.

CITY OF NEW BRUNSWICK, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency erred in withholding sewage treatment grant funds from the Middlesex County Utilities Authority (MCUA) under Section 204(b)(1) of the Clean Water Act of 1977, 33 U.S.C. (Supp. V) 1284(b)(1), because the Borough of Milltown, whose sewage is treated by MCUA, has not adopted a system of user charges as required by statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 686 F.2d 120. The opinion of the district court (Pet. App. 33a-52a) is reported at 519 F. Supp. 878.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-32a) was entered on July 22, 1982. The petition

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[1] "Pet. App." refers to the appendix in No. 82-703.

for a writ of certiorari in No. 82-662 was filed on October 12, 1982. The petition for a writ of certiorari in No. 82-703 was filed on October 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Middlesex County Utilities Authority (MCUA) operates a regional sewage treatment plant at Sayreville, New Jersey, which receives sewage flows from New Brunswick, Milltown, and several other New Jersey municipalities. As a result of a 1914 contract between New Brunswick and Milltown, the sewage from Milltown flows free of charge from Milltown to New Brunswick, and the combined flows from both municipalities are then transmitted to and treated at the MCUA plant.[2] New Brunswick pays MCUA for treatment of its own and of Milltown's sewage. Milltown pays no fee either to New Brunswick or to MCUA.

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[2] New Brunswick agreed, without any time limitation and without any charge to Milltown, to accept Milltown's sewage in the New Brunswick system and to dispose of it in the same manner as its own sewage. New Brunswick accepted this responsibility in return for Milltown's commitment to discontinue discharging its sewage into Lawrence Brook, a source of drinking water for New Brunswick. The validity of this contract twice has been upheld by the New Jersey state courts. *City of New Brunswick* v. *Borough of Milltown*, 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949); *City of New Brunswick* v. *Borough of Milltown*, 135 N.J. Eq. 310, 38 A.2d 288 (Ch. 1944). See Pet. App. 7a. The validity of the contract has been challenged by New Brunswick again in this case. That challenge was denied without prejudice by the district court so that it could be raised in state court (Pet. App. 51a-52a, 55a).

MCUA currently is expanding the interceptor lines to its Sayreville facility. MCUA has received grant assistance from EPA for this expansion pursuant to Title II of the Clean Water Act of 1977 (the "Act"), 33 U.S.C. (Supp. V) 1281 *et seq.* Title II establishes a grant program under which EPA may award federal funds for up to 75% of the construction costs of publicly-owned treatment works. The purpose of the program is to assist municipalities in treating wastes in compliance with the requirements of the Act (see Section 201(a), 33 U.S.C. 1281(a)). See Pet. App. 4a-5a.

The Act contains several restrictions on the granting of federal funds for the construction of sewage treatment facilities, including the requirement that each recipient of waste treatment services from the funded facility pay for the continued operation, maintenance, and replacement costs of the facility through user charges. Specifically, Section 204(b)(1) of the Act, 33 U.S.C. (Supp. V) 1284(b)(1), provides that the Administrator of the EPA may not approve any grant for a sewage treatment facility:

> unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share * * * of the cost of operation and maintenance (including replacement) of any waste treatment services provided by the applicant * * *.

Thus, the statute requires as a condition of receipt of federal sewage treatment grant funds that a municipal waste treatment plant adopt a system under which each individual home, business, and industry

that has wastes treated by that plant will pay its own proportionate share of treating its wastes.

EPA has issued regulations to implement the "user charge" requirement of Section 204(b)(1). Of particular relevance here is 40 C.F.R. 35.929-2(e), which provides that if a grant is for a regional treatment system, such as MCUA's, each municipality contributing wastes to the treatment works must adopt a user charge system. Because Milltown's sewage was treated by the MCUA system but Milltown had not adopted a system of user charges to pay for its proportionate share of waste treatment services, EPA determined that it could not fund MCUA's interceptor line expansion[3] beyond 80% of the grant award.[4]

2. In August 1980, New Brunswick instituted a suit in New Jersey state court against Milltown and MCUA. It sought an injunction and declaration that

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[3] As noted by MCUA (82-662 Pet. 6 n.**), the Borough of Sayreville, another municipality contributing sewage to MCUA's facility, has failed to adopt user charges for residences. EPA's decision to withhold grant funds was also based on Sayreville's failure to adopt a system of user charges. The court below did not consider the effect of Sayreville's failure to adopt a user charge system, but EPA's decision to withhold funds on that basis was recently upheld in another decision. *Middlesex County Utilities Authority* v. *Borough of Sayreville*, 690 F.2d 358 (3d Cir. 1982).

[4] Under 40 C.F.R. 35.935-13(a), for all grants awarded under EPA's 1974 regulations, such as MCUA's grant for the expansion of its Sayreville plant, the EPA Regional Administrator cannot pay more than 50% of a grant unless the grantee has "submitted adequate evidence of timely development of its system of user charges," and cannot pay more than 80% of a grant "unless he has approved the system." For all grants awarded after June 30, 1979, the Regional Administrator may not award any grant at all unless he has approved the user charge system. 40 C.F.R. 35.935-13(c).

the contract between itself and Milltown was void on several grounds, including the ground that Section 204(b)(1) required Milltown to pay its own share of the costs of operating and maintaining the MCUA facility (Pet. App. 8a-9a). In November 1980, MCUA brought EPA into the New Jersey litigation by naming it as a third-party defendant. In its third-party complaint, MCUA alleged that neither the Act nor its implementing regulations require Milltown to adopt a system of user charges and, moreover, that such a requirement would constitute an unconstitutional abrogation of the 1914 contract (*ibid.*). EPA then moved the action to the United States District Court for the District of New Jersey, where it answered and filed a counterclaim seeking both a declaration that Section 204(b)(1) authorizes EPA to withhold grant funds from MCUA pending adoption of user charges by Milltown and an injunction requiring Milltown to adopt such user charges or to cease sending its sewage through MCUA's facility for treatment (*ibid.*).

On motions for partial summary judgment by all parties, the district court decided all the federal issues in the case (Pet. App. 33a-52a). The court upheld EPA's authority to withhold grant funds from MCUA because of Milltown's failure to adopt a system of user charges. Specifically, the district court found that Milltown is a "recipient" of MCUA's "waste treatment services" within the meaning of Section 204(b)(1) (*id.* at 40a-41a). The court reviewed the legislative purposes and policies of the user charge requirement and found EPA's interpretation of the Act to be consistent with those purposes and policies (*id.* at 41a-43a). The court also rejected MCUA's and Milltown's claims that the withholding of grant

funds because of Milltown's failure to adopt user charges was an unconstitutional abrogation of the agreement between Milltown and New Brunswick, emphasizing that Congress can place reasonable limitations on its award of federal funds (*id.* at 43a-47a). The court dismissed EPA from the action and remanded the issue of the continued viability of the New Brunswick-Milltown contract to the state court (*id.* at 50a).

3. On appeal by MCUA and Milltown,[5] the Third Circuit affirmed the district court's decision (Pet. App. 1a-29a). The court explained that EPA's interpretation of Section 204(b)(1) was consistent with both the express language of the statute and the legislative purpose (*id.* at 13a-25a). Accordingly, the court deferred to the agency's interpretation and found that EPA's withholding of funds was neither illegal nor an abuse of discretion (*id.* at 12a-13a, 25a). The court also held that the agency's actions did not constitute an unconstitutional abrogation of Milltown's contract with New Brunswick. The court found that the withholding of funds from MCUA because of Milltown's failure to adopt a user charge system, while perhaps making the impairment of Milltown's contract "a more attractive alternative," did not itself require the impairment of the contract, and hence the constitutional challenge was without foundation (*id.* at 26a-28a).

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[5] The district court had rejected EPA's request that it order Milltown either to pay user charges or to cease sending its sewage to the MCUA facility (Pet. App. 50a), but EPA did not appeal that decision.

ARGUMENT

Both petitioners contend (82-662 Pet. 8-19; 82-703 Pet. 4-20) that the court of appeals erred in upholding EPA's action as consistent with both the language of Section 204(b)(1) and the purposes of Title II and the user charge requirement. They raise various objections to EPA's interpretation, which are all without merit. The decision below, on which we rely, is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

1. EPA's interpretation clearly comports with the language of Section 204(b)(1). Petitioner Milltown urges (82-703 Pet. 7) that it is not a "recipient" of waste treatment services because it "receives nothing *from MCUA*." As the court of appeals explained, however, it is undisputed that Milltown's sewage is in fact treated at the MCUA plant, and hence it is quite reasonable to consider Milltown a "recipient" of MCUA's treatment services (see Pet. App. 13a).

Petitioners contend (82-662 Pet. 15-17; 82-703 Pet. 8-9) that Milltown cannot be within MCUA's "jurisdiction" within the meaning of the statute, because that term implies a legal power to act, and MCUA has no such power over Milltown. The court of appeals correctly found, however, that EPA's interpretation of "jurisdiction" to mean the territory served by the sewage treatment plant was "certainly a plausible one" (Pet. App. 14a-15a). Thus, even if petitioners' interpretation of the statute were considered reasonable, the court of appeals correctly rejected it in the face of EPA's equally reasonable interpretation, particularly since Section 204(b)(1) specifically speaks of an "applicant's jurisdiction, *as determined by the Administrator*" (emphasis added).

See, e.g., *Train* v. *NRDC*, 421 U.S. 60, 75 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Chrysler Corp.* v. *EPA*, 631 F.2d 865, 884 (D.C. Cir.), cert. denied, 449 U.S. 1021 (1980).*

2. EPA's interpretation is also consistent with the purposes of Title II and the user charge requirement. MCUA contends (82-662 Pet. 8-9) that, because EPA's interpretation results in depriving MCUA of federal funds, it is contrary to the general purpose of Section 101(a)(4), 33 U.S.C. 1251(a)(4), of providing financial assistance to construct publicly-owned treatment works. But, as the court of appeals recognized (Pet. App. 19a), this general policy is limited by the conditions imposed by the statute on the receipt of funds, including the user charge requirement. Obviously, the purposes of the statute are frustrated if full funding is provided to a system that does not meet these mandatory conditions, even if there is a need for the funding.

Petitioners also contend (82-662 Pet. 10-11; 82-703 Pet. 12-14) that EPA's interpretation is contrary to Congress' intention that an applicant be allowed "flexibility in the design of a system of user charges that meets the unique requirements of his own jurisdiction." S. Rep. No. 92-414, 92d Cong., 1st Sess. 28 (1971). This statement, however, evinces Congress'

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* There is no merit to Milltown's contention (82-703 Pet. 19-20) that no deference is due EPA's interpretation because its "technical expertise" is not involved. Deference is due an agency's interpretation of the statute it administers, whether or not the question concerns a technical matter. By the same token, it is clear that EPA has jurisdiction under Section 204(b)(1) to withhold grant funds, so Milltown's contention (82-703 Pet. 19-20) that no deference is due EPA's interpretation because it seeks to extend EPA's statutory jurisdiction rests on a faulty premise.

intent only that there be flexibility in the *design* of a user charge system; it does not suggest any relaxation of the underlying requirement that each user pay its proportionate share of treatment costs through user charges. Thus, the court of appeals correctly concluded that Congress' flexibility policy does not extend "to the very question of whether a particular recipient of treatment services will adopt a user charge system in the first place" (Pet. App. 22a; footnote omitted), and hence EPA's interpretation fully comports with Congress' intent.

By the same token, contrary to petitioners' assertions (82-662 Pet. 14; 82-703 Pet. 17-18), this decision does not conflict with the recent Ninth Circuit decision in *Hotel Employers Association* v. *Gorsuch*, 669 F.2d 1305 (1982). In that case, the court upheld EPA's approval of a particular user charge system, emphasizing that Congress intended municipalities to have flexibility in fashioning an appropriate user charge system. That decision did not hold that the "flexibility policy" could be used to exempt certain users from the user charge requirement altogether. As stated by the court below (Pet. App. 23a n.17), "*Hotel Employers* stands for the proposition that the courts will defer to the EPA's exercise of the flexibility that it undoubtedly has in administering the Clean Water Act grants, and will not substitute their own judgment for the EPA's." Clearly, the decision below is entirely consistent with *Hotel Employers*.

Petitioners also contend (82-662 Pet. 14; 82-703 Pet. 11-14) that EPA's action here will not further the "financial stability" purpose of the user charge requirement. One purpose of the user charge requirement is to assure that municipal treatment facilities will be financially self-sufficient so that they

can continue to treat wastes in compliance with the Act. Contrary to petitioners, however, this purpose would not be served by allowing New Brunswick to pay Milltown's share of treatment costs and thus bear a disproportionate burden. As recognized by the court of appeals (Pet. App. 24a), should New Brunswick be unable to continue to pay such a disproportionate share, the MCUA would be left with precisely the kind of revenue shortfall that Section 204(b)(1) was designed to avoid. Indeed, the language of Section 204(b)(1) itself plainly rejects petitioners' argument in that it expressly requires that each user pay its "proportionate share." Under no circumstances can it be contended that Milltown is paying its "proportionate share" for treatment services since it pays nothing at all.

Nor is there any merit to petitioners' contention (82-662 Pet. 11-14; 82-703 Pet. 14-16) that the courts below wrongly relied on Congress' intent that user charge systems provide an incentive for water conservation. While the legislative history of the 1972 Amendments to the Clean Water Act, when Section 204(b)(1) was first enacted, does not explicitly address water conservation, the court of appeals correctly found that "water conservation is an obvious if unstated goal of the 1972 Act" (Pet. App. 24a n.19). See 54 Comp. Gen. 1, 5 (1974) (holding that Section 204(b)(1) did not permit user charge systems based on ad valorem taxes because such a system would not advance the goal of water conservation served by user charges). Moreover, the repeated references to water conservation in the legislative history of the 1977 Amendments clearly acknowledge the water conservation goals already implicit in Section 204(b)(1). See S. Rep. No. 95-370, 95th Cong., 1st Sess. 27 (1977), *reprinted in* A Leg-

islative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. 660 (Comm. Print 1978) (hereinafter "1977 Leg. Hist."); *id.* at 439, 1360.[7]

In sum, EPA's statutory interpretation that Section 204(b)(1) does not permit it fully to fund a waste treatment system like MCUA in which each recipient does not pay user charges is a reasonable one that was correctly upheld by the court of appeals. *Udall* v. *Tallman, supra; Chrysler Corp.* v. *EPA, supra.* Similarly, contrary to MCUA's contention (82-662 Pet. 19-21), EPA did not abuse its discretion in finding that Milltown's failure to pay for sewage treatment made MCUA ineligible for further funding. As the court of appeals held (Pet. App. 20a-21a), the determination whether Milltown's failure was "inconsequential" was primarily a matter for EPA and there is no basis for overturning it as arbitrary and capricious.[8]

3. Although it concedes that this argument "is not a proper basis for certiorari in its own right," Mill-

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[7] Petitioners' contention (82-662 Pet. 13-14; 82-703 Pet. 16) that Congress abandoned any water conservation goal when it sanctioned user charge systems based on ad valorem taxes in 1977 is belied by this legislative history, which stressed water conservation. See Pet. App. 25a. Indeed, in 1977 Congress furthered the water conservation objective by requiring that, where user charge systems are based on something other than metering, users are to be notified of the portion of their bill attributable to the cost of water treatment. Section 204(b)(4)(B), 33 U.S.C. (Supp. V) 1284(b)(4)(B); see also 1977 Leg. Hist. at 439.

[8] Relying on *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981), Milltown argues (82-703 Pet. 5-7) that the user charge condition of the grant does not apply to it because it never "voluntarily and knowingly accept[ed]" the terms of the "'contract.'" This argument is specious. Milltown is not the grant recipient, and the grant condition does not require it to do anything; hence, *Pennhurst* has no relevance to the situation here.

town also argues (82-703 Pet. 20) that EPA's interpretation of the statute should be rejected because it raises a constitutional problem concerning the abrogation of Milltown's contract with New Brunswick. This argument is wholly without merit. Milltown completely ignores the court of appeals' explanation that the statute as interpreted by EPA in no way abrogates Milltown's contract (Pet. App. 26a-28a). EPA has simply concluded that MCUA has not met the requirements of Section 204(b)(1), and thus is not entitled to certain federal funds, because of Milltown's failure to adopt a user charge system. The contract may remain in force or it may be abrogated voluntarily by the parties in order to permit MCUA as presently constituted to receive full federal funding, but the statute itself does not impair the contract. Hence, EPA's interpretation raises no constitutional question at all.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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